SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1017

THE BOEING COMPANY,

Appellant,

V.

PHILLIP HAMM, AS COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ALABAMA 3 DIV. 309-327, INCL.

MOTION TO DISMISS APPEAL AND TO AFFIRM AND BRIEF IN SUPPORT THEREOF.

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Alabama Sales Tax Regulation "A"
(Providing for a permit for purchases or users who buy regularly in large quantities, to pay tax directly to the State)

Issued under section 29 of Act 100, supra, Title 51, section 786(30), supra 16
See Jurisdictional statement, page 58a.

IN THE

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V.

PHILLIP HAMM, AS COMMISSIONER OF REVENUE OF THE STATE OF ALABAMA,

Appellee.

ON APPEAL FROM THE
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3 DIV. 309-327, INCL.

MOTION TO DISMISS AND TO AFFIRM.

Appellee, pursuant to Rule 16 of the Revised Rules, moves that the appeal in this cause as filed by the Appellant be dismissed. Also that the opinion and judgment of the Supreme Court of Alabama, and also same as modified and extended on rehearing (Appendix-B to Appellant's Jurisdictional Statement, pp. 10a-32a, incl.) be affirmed. Moreover, that such be done on the grounds that the Alabama Supreme Court has in entering said judgment done nothing more than to strictly follow the decisions of this court in resolving the question involved as against the Appellant.

From aught that appears, this court has already decided the alleged question raised by the Appellant against the Appellant in other cases[1*] having very similar factual backgrounds. The question referred to is whether the cost-plus-a-fixed-fee contractor in purchasing the materials, etc., used by it to perform the government contracts involved, and to earn its fixed fees thereunder, was an agent of the United States in making such purchases, and as such clothed with the immunity of the Federal Government from paying state sales taxes on the sales made in this connection by the suppliers to such contractor.

The foregoing being considered, it appears that the Supreme Court of Alabama in deciding said question against the Appellant, and to the effect that the sales here involved to the Appellant from the suppliers were sales made to the Appellant "as an independent contractor and not as an agent of the government," has only followed the decisions of this court, and mainly **Alabama v. King & Boozer**, 378 U.S. 39, 845 S.Ct. 1518 (1941), **Curry v. United States**, 314 U.S. 14, 62 S.Ct. 48 (1941), and the principles thereof as recently restated and reaffirmed in **United States v. Boyd**, 378 U.S. 39, at 46, 49, and 50, 84 S.Ct. 1518, at 1522, 1524 and 1525 (1964). The Alleged question here then appears to have already been resolved and settled by this Honorable Court, and there seems to be no need to further review the subject matter.

> "* * * Constitutional immunity does not extend to cost-plus-fixed-fee contractors of the Federal Government, but is limited to taxes imposed directly on the United States * * *"
>
> (Emphasis Supplied)

1* **United States v. Boyd**, 378 U.S. 39, 84 S.Ct. 1518 (1964); **Alabama v. King & Boozer**, 314 U.S. 1, 62 S.Ct. 43 (1941); **Curry v. United States**, 314 U.S. 14, 62 S.Ct. 48 (1941); **James v. Dravo Contracting Company**, 302 U.S. 134, 58 S.Ct. 208; etc.

United States v. Boyd, supra, 378 U.S. at 49 and 50, 84 S.Ct. at 1524 and 1525 (1964). See also **Alabama v. King & Boozer**, supra, 314 U.S. at 8 and 9, 62 S.Ct. at 45, and **Curry v. United States**, supra, 314 U.S. at 18, 62 S.Ct. at 49.

I

OPINION BELOW

The opinion below on appeal from the Montgomery County Circuit Court and also modified and extended on rehearing and wherein rehearing was denied, is now found in the Advance Sheet of the Southern Reporter dated January 16, 1969, and is unofficially reported as 216 So.(2d) 288, and as yet has not been officially reported. (Appendix-B to Appellant's Jurisdictional Statement, pp. 10a - 32a, incl.)

On rehearing the Alabama Supreme Court modified and extended the opinion and reversed the decision of the Montgomery County Circuit Court and in its stead rendered a decree in accordance with its own opinion. (216 So.(2d) at page 297, also Appendix-B at page 32a) The Alabama Supreme Court then nullified the decree and judgment of the Montgomery County Circuit Court (Appellant's Jurisdictional Statement, Appendix-A, p. 1a, et seq.) and held it to be erroneous in its entirety.

In addition to its opinion on appeal and opinion as modified and extended on rehearing (216 So.(2d) 288, et seq.), the Alabama Supreme Court completely annulled the final judgment and decree of the lower court, and in its stead wrote the final judgment and decree for the lower court.

> "IT IS CONSIDERED and ORDERED that the judgment of this court, dated October 3, 1968, should be modified by rendering in this court the judgments that the Circuit Court should have rendered.

"IT IS THEREFORE ORDERED AND ADJUDGED that the judgments of the Circuit Court in each of said causes be reversed and annulled; and this court, proceeding to render the judgments that the Circuit Court should have rendered, does hereby determine, order and adjudge that the sales tax collected from the plaintiff in each of these cases was legally and validly collected, and that no part thereof is due to be refunded to the plaintiff."

(Emphasis Supplied)

See Appendix-C to Appellant's Jurisdictional Statement, pp. 33a and 34a.

The first several paragraphs of the decree of the Montgomery County Circuit Court in these cases are highly prejudicial and are completely disassociated from the facts and the issues. (See pp. 1a and 2a of Appendix-A of Appellant's Jurisdictional Statement). The tenor of said opening paragraphs seems to permeate the entire decree. (Appendix-A, pages 1, et seq.).

In reversing the judgments of the Circuit Court and in holding the sales tax to have been legally and validly collected by the State of Alabama from the Appellant, the Alabama Supreme Court held that the decision of this court in **Alabama v. King & Boozer**, 314 U.S. 1, 62 S.Ct. 43, was controlling, in that nothing in the contracts in these cases (like in **King & Boozer**) gave the cost-plus contractor the right to obligate the government (NASA) or to pledge its credit in any fashion. It is also interesting to note that the decision in **King & Boozer**, as in this case, dealt with a contract which declared that title to all materials and supplies for which the contractors were entitled to be reimbursed should vest in the government.

"The circumstance that the title to the lumber passed to the government on delivery does not obligate it to the contractor's vendor under a cost-plus contract more than under a lump sum contract."

Alabama v. King & Boozer, supra, 314 U.S. at pages 13 and 14, 62 S.Ct. at page 47. See also **James v. Dravo Contracting Company**, 302 U.S. 134, at 160, 58 S.Ct. 208, at 221 (1937) and **United States v. Driscoll**, 96 U.S. 424, 24 L.Ed. 847 (1878).

On the basis of the fact that there was nothing in the contracts in these cases which gave the Appellant, as the cost-plus contractor, the right to obligate the government for the price of the materials, etc., or whereby the Appellant could pledge the government's credit when the sales were made by the suppliers to the Appellant, and the Appellant in this respect actually risked its own credit in purchasing the materials (whether the purchases were made under Contracts 5608 or 5606-F) the Alabama Supreme Court determined that the Appellant, "as an independent contractor and not an agent of the government" was the "purchaser" of the materials, and the person on whom the tax is said to fall under the Alabama Sales Tax Act.

On this basis, the Alabama Court observed that the situation differs substantially from that in the decision in **Kern-Limerick, Inc. v. Spurlock**, 347 U.S. 110, 74 S.Ct. 403 (1954), wherein the Arkansas Sales Tax was struck down. The contract there provided that, "The contractor shall act as the purchasing agent of the government in effecting such procurement * * *" It also provided that, "the government shall be directly liable to the vendors for the purchase price." 347 U.S. at 112, 74 S.Ct. at 405 (Margin 2). Under such circumstances the majority of this court held that the government (and not the contractor) was the "purchaser" on whom the tax was said to fall, but on whom the tax could not be validly levied or applied under the constitution.

In these cases, and to make the situation even a stronger one than that, in **Alabama v. King & Boozer**, supra, the court

pointed out that the prime contract (Contract No. 5608) in these cases under Article I A, "Statement of the Work, Services and Supplies to be Furnished," Plaintiff's (Appellant's) Exhibit 1(b), R. pp. 442, at 444, expressly provides that:

> "The contractor, as an independent contractor and not as an agent of the government, shall * * * furnish the necessary management, labor, facilities, materials, tools, and equipment (except as specified herein to be furnished by the government) * * *"
>
> (Emphasis Supplied)

The foregoing being considered, it appears that whether we proceed under the so-called "legal incidence" doctrine of **King & Boozer** and of **Boyd**, or the so-called "contract-agency" doctrine of **Kern-Limerick, Inc. v. Spurlock**, that the Appellant as an "independent contractor" under either doctrine is clearly liable for the tax.

II.

STATEMENT OF APPELLANT IN SUPPORT OF JURISDICTION

The Appellee does not deny that the alleged question on this appeal is a federal question, and one that this court has every right and authority to review if it chooses to do so. What the Appellee is saying in this respect is that it clearly appears that this court has, in **King & Boozer, Curry, Dravo Contracting Company**, and under the principles that it has enunciated in **Boyd**, and wherein it reaffirmed **King & Boozer** and **Curry**, already actually resolved the alleged question in this case, and there is really no necessity in spending its valuable time in reviewing same. As pointed out by the Alabama Supreme Court (Appendix-B, pp. 29a and 30a -- Jan. 16, 1969, Pocket Part to 216 So.(2d), at pages 295 and 296), even under the holding in **Kern-Limerick, Inc. v. Spurlock**, 347 U.S. 110, 74

S.Ct. 403, and the "contract-agency" doctrine, the Appellant under the facts and the contracts in this case did not have the necessary attributes of an agent of the government in making the purchases of the materials, etc., nor could it have clothed itself with the immunity of the sovereign from paying the state sales tax on the sales made to it by the vendors or suppliers. In fact, the prime contract (Contract 5608, Exhibit 1(b), R. p. 442, at p. 444) expressly provided that the Appellant was to furnish such materials, etc., and to otherwise perform the contract "as an independent contractor and not as an agent of the government." This is completely the antithesis of what was contained in the contracts in **Kern-Limerick, Inc. v. Spurlock, supra,** which expressly provided that the purchases were made by the government and that the government was obligated directly to the vendors for the purchase price.

The foregoing was very graphically illustrated in the opinion of the Alabama Supreme Court, as follows:

> "If the Supreme Court can be taken at its word that the form of contracts 'may determine the effect of state taxation on federal agencies' then we must conclude that these contracts fail to provide for immunity from state taxation for the independent contractor. Apparrently under **Kern-Limerick** there was nothing to prevent the federal government from so drawing the contracts. We think the case controlled by **Alabama v. King & Boozer**, supra. There, as here, the contract provided that title to all materials and supplies for which the contractors were 'entitled to be reimbursed' should vest in the government upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance by the government officer. There the Supreme Court held that
>
> > '* * * we think all the provisions which we have mentioned, read together, plainly contemplate that the contractors were to purchase in

> their own names and on their own credit all the materials required, unless the government should elect to furnish them; that the government was not to be bound by their purchase contracts, but was obligated only to reimburse the contractors when the materials purchased should be delivered, inspected and accepted at the site.
>
> * * *
>
> 'But however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the government to enter into contracts or to pledge its credit.' (314 U.S. at 13 and 14, 62 S.Ct. at 47)

"So, here, the contracts expressly provide that Boeing is an independent contractor and not an agent of the government. Nothing in these contracts gives to Boeing the right to obligate the government or pledge its credit in any fashion. It differs substantially from the contract in **Kern-Limerick** which expressly provided for purchase orders with the following language:

> 'This purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price; but the Contractor shall handle all payments hereunder on behalf of the Government. The Vendor agrees to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Contractor. Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor shall not acquire title to any thereof.' (347 U.S. at 119 and 120, 74 S. Ct. at 409)
>
> * * *

"Paraphrasing the language of the Supreme Court of the United States in **U.S. v. Boyd**, 378 U.S. 39, at page 48, we cannot conclude that Boeing (Carbide and Fergerson in that case) a cost-plus-fixed-fee contractor for profit has been so incorporated into the government structure as to become an instrumentality of the United States and thus enjoy governmental immunity."

(Emphasis Supplied)

Jurisdictional Statement
Appendix, pp. 27a and 28a

The statements hereinabove made being considered, we do not dispute what the Appellant says in its "Grounds on Which Jurisdiction is Invoked." (Jurisdictional Statement, pp. 2 - 5, incl.)

We would like to add under paragraph number 5, page 5, of the Jurisdictional Statement, that the Alabama Sales Tax Act as rewritten and reenacted in 1959, as Act 100 of the 1959 Second Special Session of the Alabama Legislature (Acts of Alabama 1959, Vol. I, p. 298, et seq.), can now be found in the Pocket Part to Title 51 of the Alabama Code as Recompiled in 1958, as Sections 786(2) - (36), inclusive. Prior to the reenactment of the Act as Act 100 in 1959, supra, the Alabama sales tax was contained in Title 51, as Sections 752 - 781, inclusive, of the Alabama Code of 1940.

The levying Section of the Act, Title 51, Section 753 of the 1940 Code, which was mainly construed in **Alabama v. King & Boozer**, 314 U.S. 1, 62 S. Ct. 43, by the Alabama Court and also by this Court, has not in any material way been changed. Under Section 786(3) of Title 51, Pocket Part, 1958 Recompiled Alabama Code, and under subsection (a), the sales tax is still levied on the "retail sale" and the purchaser at said sale, the same as it was under Title 51, Section 753, supra, when that Section was considered and construed by this Court in **King &**

Boozer (314 U.S. at pages 9 and 10, under headnotes (2-4), 62 S. Ct. at pages 45 and 46).

> "The taxing statute as the Alabama courts have held, makes the 'purchaser' liable for the tax to the seller who is required 'to add to the sales price' the amount of the tax and collect it whether the sale is for cash or credit. Who in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority. But it seems plain, as the government concedes, as we assume for present purchases, that under the provisions of the statute the purchaser of tangible goods who is subject to the tax measured by the sales price is the person who orders and pays for them when the sales is for cash or who is legally obligated to pay for them when the sale is on credit."
>
> (Emphasis Supplied)
>
> **Alabama v. King & Boozer**, 314 U.S. 1, at 9 and 10, 62 S. Ct. 43, at 46.

The undisputed facts in these cases show that the Appellant, as the cost-plus-a-fixed-fee contractor, ordered the materials and other tangible property, which it used in performing the contracts, from the suppliers. The suppliers billed the Appellant for the price of the materials, etc. (See Plaintiff's (Appellant's) Exhibits 1-G and 1-F, pp. 894-1029, incl., and 1032-1036, incl., respectively, the Purchase Orders and Billings; testimony of Mr. ImMasche, R. pp. 245, 246, and 247, and of Mr. McCutcheon, R. p. 265; Plaintiff's Exhibit 1-(a), Stipulation, R. p. 310). Moreover, the suppliers billed (Exhibit 1-F, R. pp. 1032-1036) the Appellant for the price of the materials in each instance, and the suppliers looked to the Appellant (and not the government) for payment, and the Appellant paid the suppliers in each instance with checks drawn on its own bank account and out of its own private funds. (R. pp. 244-247, incl., p. 265, and Stipulation, Exhibit 1-(a), R. p. 310).

The conclusive evidence then shows that the Appellant ordered the tangible personal property used by it in performing the contracts from the suppliers, that the suppliers billed the Appellant for the price of the tangible personal property, and looked to the Appellant (and not the government) for payment. And further that the Appellant in each instance paid the suppliers with its own checks and out of its own bank account and private funds. It is true that the government under the cost provisions of Contracts 2577 and 5608, reimbursed the Appellant for such expenditures each month, but it did so as it did as to any other item of cost under such contracts, i.e., for labor, rent, etc., and as a part of the cost.

Under the terms of the contracts and the facts, the Alabama Supreme Court in these cases held in effect that the Appellant as the cost-plus-a-fixed-fee contractor was the purchaser of the materials, etc., and the person on whom the tax fell. Moreover, that the materials were purchased by the Appellant, "as an independent contractor and not an agent of the government," and that these cases were "controlled by **King & Boozer**, supra," and not by **Kern-Limerick, Inc. v. Spurlock**, supra.

III.

STATEMENT OF THE CASE

In replying or supplementing what the Appellant has to say under each of the sub-topics under this general heading the Appellee will in each instance use the same heading as the Appellant has used.

Introduction

We agree that during most of the period covered by the audit and time involved in these cases, cost-plus-fixed-fee contract 5608 was the prime and main contract. However, Contract 5608

was actually an extension of Contract NA58-2577. (Exhibits 1(a) and 1(b), R. pp. 318, et seq., and 442, et seq., respectively). Both contracts were cost-plus-a-fixed-fee contracts. However, such facts are very conspicuous by their absence in the facts as are related by the Appellant. The Appellant fails to mention in its Jurisdictional Statement that these contracts were cost-plus-a-fixed-fee contracts.

Under Contract No. 2577 (Exhibit 1(a), R. p. 318) the estimated cost was $8,418,924.00, and the fixed fee was $492,038.00, and the total amount was $8,910,962.00.

Under Contract No. 5608 (Exhibit 1(b), R. p. 444) the estimated cost was $393,605,856.00, and the fixed fee $25,215,111.00, making a total of $418,820.967.00.

However, the above figures in both of the contracts were substantially increased from time to time by supplements to said contracts.

Contract No. 5606-F (Exhibit 1(c), R. p. 798 et seq.) is closely related to cost-plus-fixed-fee Contracts 2577 and 5608, and is said to be a cost contract only. However, it is closely related to Contracts 2577 and 5608, and constitutes actually a part thereof. It is a so-called "facilities" contract and deals with the purchases by the Appellant-contractor of certain types of "facilities" equipment, i.e., lathes, generators, drill presses, pumps, etc., which were used by the Appellant in performing Contracts Nos. 2577 and 5608. (Stipulation, Exhibit 1, pp. 311 and 312):

> "7. Plaintiff is engaged in research and development work at George C. Marshall Space Flight Center at Huntsville, Alabama. Its work is performed as a prime contractor with the United States Government under three interrelated contracts which are listed in paragraph 8 hereinbelow. The taxes here involved are

imposed by reason of acquisitions of tangible personal property by plaintiff from sellers or suppliers within the State of Alabama in connection with such contracts.

"The nature of plaintiff's work under the three interrelated contracts which appear as Plaintiff's Exhibit 1(a), (b) and (c) -- which contracts sometimes hereinafter will be referred to as "2577," "5606(F)" and "5608" -- is set out in each of the contracts * * *

"5608 carries the initial planning through manufacture and system tests of the S-1C. Under 5608, plaintiff has provided engineering design for the S-1C booster and for test equipment such as that used in the Dynamic Test Vehicle, which is a structure, the instrumentation for which was furnished by plaintiff, in which the entire Saturn V system (S-1C, S-II and S-IV B rockets) can be tested, in vertical position, for structural, aerodynamic and certain other characteristics.

"Contract 5608 is a cost-plus-fixed-fee contract (as was 2577). The "fixed fee" is based upon estimated costs which were agreed upon by plaintiff and NASA for fee determination purposes during negotiation of the contract. Contract No. 5606(f) is a cost contract only, and plaintiff receives no fee in connection therewith.

"Contract No. 5606(F) is a "facilities" contract rather than a "research and development" contract. It is merely an agreement which established the terms under which plaintiff was authorized and directed to acquire certain types of general-use facilities with which to carry out the work required under 2577 and 5608."

(Emphasis Supplied)

Stipulation, Exhibit 1, R. pp. 308-311, incl.

Contracts Nos. 2577 and 5608 under Article II, Services and Supplies to be Furnished, Statement of Work, Exhibits 1(a) and 1(b), R. pp. 320 and 444, respectively, expressly provide that the contractor is to furnish the labor, materials, etc., and to

otherwise perform these contracts, "as an independent contractor and not an agent of the government."

Appellant contends that these provisions of the contracts are mere labels, and are actually shadows without substance. However, it is hard to believe that such provisions were inserted in these contracts for no reason at all and just to fill up space. When, however, the Appellant comes to the Title Provisions of these contracts, this of course, is another story.

Actually, the Appellant was to assist in developing the Appollo-Saturn moonship or rocket, and primarily to develop the S-1C or initial thrust part. See Configurations on pages 1037 and 1038 of the Record. However, the Appellant did play a part in "still" testing from time to time several of the complete experimental rockets, as a part of the overall research and development program.

We agree that the controversy here arises from the imposition by the State of the tax as against the Appellant, as the Contractor, as to the purchases it has made of the materials, etc., from the suppliers, which materials the Appellant used in performing cost-plus-fixed-fee Contracts Nos. 2577 and 5608 and that the Appellant contends in this respect and mainly under the "Title" and the "Government Property," provisions of the contracts, that such acquisitions were made by it as an agent of the government (NASA), and that its purchases (and the retail sales in this respect) were immune from taxation under the doctrine of sovereign immunity.

On the other hand, it is the Appellee's contention that not only under the provisions of the Contract expressly designating the Appellant as "an independent contractor" in furnishing the materials and in otherwise performing said contracts, but also under the undisputed facts, that the Appellant ordered the materials in its own name, obligated its own credit and paid

for the materials with its own funds, and that the suppliers looked to the Appellant (and not the government) for payment,[*2] that these cases fall directly within the doctrines and purview of **King and Boozer** (314 U.S. 1, 62 S.Ct. 42) and **Curry** (314 U.S. 14, 62 S.Ct. 48), which were reiterated and reaffirmed in **Boyd** (378 U.S. 39, 84 S.Ct. 1518). This was also the view of the Alabama Supreme Court in reversing and in rewriting the judgments and decrees of the Montgomery County Circuit Court.

The Nature of the Alabama Sales Tax

What the Appellant has to say under its first four paragraphs of this sub-topic is substantially correct. However, we disagree somewhat with what the Appellant states under its fourth and last paragraph under this sub-topic.

We agree that the Alabama Sales Tax is a "vendee tax." However, the incidence of the tax has been said to be on the "purchaser" at the retail sale, and the "purchaser" at the retail sale is "the last person to whom property passes in the course of ownership," as contemplated by the old law (Title 51, Section 753(a), Alabama Code 1940) and under the new law (Act 100, Section 2(a), supra, Title 51, Section 786(3)(a), Pocket Part, Alabama Code, Recompiled 1958). This is clearly a matter of fact as well as law. The tax is collected when the retail sale is made and the tax is paid by the purchaser at the cash register. Failure of the vendor to collect the tax from the "purchaser" when the sale is made (where the sale is for cash) violates the penal provisions of the law. The tax, therefore, becomes due when the retail sale is made, and the vendor

[*2] See in this respect testimony of ImMasche, R. pp. 245, 246 and 247; of McCutcheon, R. pp. 265; stipulation, Exhibit 1, p. 310; Purchase Orders, R. pp. 904-1029, incl.; and Invoices and Billings, R. pp. 1030-1039, incl.

is required by law (subject to penalties) to collect the tax from the "purchaser," at the time of the retail sale.

As mentioned by the Appellant, the reason that the vendors or suppliers did not collect the tax from the Appellant at the time the sales were made by them to the Appellant was because the Appellant had procured a so-called Regulation "A" permit (Act 100, Section 29; Title 51, Section 786(30), Pocket Part, Alabama Code, Recompiled 1958) which permitted the Appellant as a large purchaser and user, and as a matter of convenience, to report and pay the tax directly to the State Department of Revenue (instead of the vendor or suppliers at the time of the retail sale) on a monthly basis.

The sales tax then is to be collected from the "purchaser" at the retail sale, and the tax falls on the purchaser. **Alabama v. King and Boozer**, supra; 314 U.S. at 9, 10, and 12, 62 S.Ct. at 45, 46, and 47. **National Linen Service Corp. v. State Tax Comm.**, 237 Ala. 360, 186 So. 478 (appendix 1-B, p. 16a); **Associated Contractors v. Hamm** (1964), 277 Ala. 500, 172 So.2d 385, at 388.

> ". . . The taxing statute, as the Alabama courts have held, makes the 'purchaser' liable for the tax to the seller who is required 'to add to the sales price' the amount of the tax and collect it when the sales price is collected, whether the sale is for cash or on credit. Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority. But it seems plain, as the Government concedes and as we assume for present purposes, that under the provisions of the statute the purchaser of tangible goods who is subject to the tax measured by the sales price is the person who orders and pays for them when the sale is for cash or who is legally obligated to pay for them if the sale is on credit. . . ."
>
> (Emphasis Supplied)

Alabama v. King and Boozer, supra, 314 U.S. at pages 9 and 10, 62 S.Ct. at pages 45 and 46.

The Appellant is clearly the "purchaser" in these cases, upon whom the tax falls. The undisputed evidence is that the Appellant orders the materials, pays for them with its own checks, and out of its own private funds, and that the suppliers look to the Appellant (and not the government) for payment. (R. pp. 245, 246, 247, 265, Stipulation, Exhibit 1, page 310, Purchase Orders, R. pp. 904-1029, and Billings, R. pp. 1030-1039.)

How the Federal Question was Raised in the Proceeding Below

We do not dispute what the Appellant has said under this topic. We certainly do not agree with the Appellant's contentions raised in its bill of complaint or raised otherwise in these proceedings, but we certainly do not deny that the Appellant has made them, or that the other proceedings described by the Appellant under this topic are not in keeping with the facts.

Again, we reiterate that the question involved here is in our humble opinion clearly a federal one, and that this court is clearly authorized and empowered to review the cases, if it chooses to do so. It clearly appears, however, that the question has already been resolved by this Court in **King and Boozer** and in **Curry**, and that the doctrines of those cases have recently been both restated and reaffirmed in **United States v. Boyd.**

V.

STATEMENT OF THE FACTS

We do not intend to attempt to re-try these cases on the merits or propose to engage in a running gun battle with the Appellant concerning what it says are the facts. Much of what

the Appellant says are facts under this heading are actually conclusions or attempted interpretations of some of the documents involved, rather than facts.

a. The Contracts In General

Time, space and the rules of the court will not permit the Appellee to detail the facts involved, which are contained in three voluminous volumes of the record. However, it is well to state that the Appellant, Boeing, a private corporation, during the time involved, was engaged in performing three "inter-related" contracts, namely, 2577, 5608 and 5606-F. (See Stipulation, Par. 8, R. pp. 228, et seq.). Contracts Nos. 2577 and 5608 were cost-plus-a-fixed-fee contracts. (Appellant's Exhibits 1(a), R. pp. 318 et seq., and 1(b), R. pp. 442 et seq., respectively).

Under Contract 2577 the estimated cost was, to wit, $8,418,924.00, and the fixed fee was $492,038.00, although by supplements thereto these figures were from time to time substantially increased. (R. p. 318). Under Contract 5608 the estimated cost was $393,605,856.00, and the fixed fee was $25,215,111.00, but by supplements to the contract these figures were also from time to time substantially increased. (R. p. 442).

Contract No. 5606-F, which was inter-related to contracts 2577 and 5608, and actually a part (Stipulation, Par. 7, R. p. 228) or supplement thereof, was a cost contract only and dealt with the procurement of certain facilities and equipment to be used by the contractor under Contracts Nos. 2577 and 5608. (Appellant's Exhibit 1(c), R. pp. 798, et seq.).

Under said cost-plus Contracts 2577 and 5608 the Appellant was engaged in an overall program with NASA and other government cost-plus-a-fixed-fee contractors in an effort to

develop the Appollo-Saturn Rocket or so-called Moonship. The Appellant was mainly engaged in this respect in developing the initial thrust part of the rocket or the so-called S-1C. (See diagrams, R. pp. 1038 and 1037; also R. p. 249, etc.). However, at the Dynamic Test Stand located on the Huntsville Arsenal the Appellant not only "shake" tested the S-1C, but it also participated in "shake" testing several completely assembled experimental rockets. (R. pp. 251, 285, 286, etc.). In Alabama the Appellant's work under Contracts 2577 and 5608 was exclusively research and development. (R. pp. 228, etc.). It used all the materials, equipment and supplies which it purchased from the vendors in Alabama in performing said work and said Contracts 2577 and 5608. (R. p. 251, etc.).

b. The Materials Were Ordered And Paid For By The Contractor.

The undisputed evidence and testimony of the Appellant's own witness, Mr. ImMasche, the Appellant's Finance Officer at New Orleans, and Mr. McCutcheon, one of the Government Property Administrators at Huntsville Arsenal, was to the effect that the Appellant ordered the materials, etc., from the suppliers, was billed for the purchase price by the suppliers, and that the Appellant paid the suppliers for the materials with its own funds, and with checks drawn on its own private bank account. (R. pp. 245, 246 and 247; also R. p. 265; Stipulation, Exhibit 1, R. p. 310).

The suppliers looked to the Appellant (not the government) for payment of the purchase price. (R. 245 and 246; R. p. 265). This is also very obvious from an examination of the representative copies of the purchase orders, which were introduced in evidence. They all show the Appellant to be the "buyer" or purchaser, and the suppliers to be the sellers. (Exhibit 1-F, R. pp. 894-1029, incl.) and it is also very clear from the purchase invoices or billings from the suppliers. These billings

are all to the Appellant as the "buyer" or purchaser, and they are just regular billing forms used as to any other private sale.

They are exclusively between the supplier and the Appellant as the "buyer." They say nothing whatsoever about the government, nor is the government mentioned thereon. (Exhibit 1-G, R. pp. 1030-1036, incl.).

The purchase orders and the billings (R. pp. 894-1029, pp. 1030-1036) do not at any place provide that the purchases are to be made with funds belonging to the government, or that the government is to be bound for the payment of the purchase price. Moreover, there are clearly no provisions in the contracts (2577, 5608, and 5606-F) to this effect.

There is then not one document which is applicable to these cases, which expressly provides that the purchases were to be made with government funds or that the government was to be bound to the vendors for the payment of the purchase price of the materials, or that the contractor was authorized to pledge the government's credit. On the other hand, Contracts 2577 and 5608, expressly provide to the contrary, that the Appellant was to perform the contracts and furnish the necessary labor, materials, etc., "as an independent contractor and not as an agent of the government." (R. pp. 320 and 444).

In addition to the foregoing, the vendors or suppliers delivered the materials to the Appellant either at its Complex and place of business located in downtown Huntsville, Alabama, or at its Dynamic Test Stand located on the Redstone or Huntsville Arsenal. (R. pp. 265, 266). Moreover, the materials, etc., were all stored by Boeing or were otherwise under Boeing's custody and control until Boeing used the materials, equipment and supplies in performing Contracts Nos. 2577 and 5608. (R. pp. 247, 248, 250, etc.).

It is also well to state that the audit made by the State's Agent and Accountant, Mr. Alspaugh (R. pp. 1039-1104, incl.), and which is the basis for all of the tax claimed to be due by the state,, includes (after all deletions have been made) only the sales of materials, equipment and supplies which were purchased by the Appellant from private suppliers or vendors. The State's Auditor, Mr. Alspaugh, so testified. (R. pp. 297-300, incl.).

c. Facts Are Comprehensively Stated In The Stipulation And In The Opinion Of The Alabama Supreme Court.

The facts of these cases are very comprehensively stated in the Stipulation (Exhibit 1, R. pp. 227-236, incl., and 307-317, incl.) and in the Opinion of the Supreme Court of Alabama. (Appendix B to Jurisdictional Statement, pp. 10a-14a, incl.; 216 So.(2d) at pages 289, 290 and 291). Therefore, to save time and space the Appellee will by way of reference adopt the facts as are stated in the Stipulation (R. p. 227-236) and in said Opinion (Jurisdictional Statement, Appendix, pp. 10a-14a, incl.) and will make them a part hereof as if they were copied herein, in addition to the facts as have been hereinabove stated.

d. Neither The Contracts Or The Conditions Said To Relate To The Purchase Orders Made The Appellant The Agent Of The Government Or Authorized The Appellant To Bind Or To Pledge It's Credit.

The Appellant really grabs at straws and appears to attempt to twist certain remote and fine print provisions of the contracts, or the instructions or conditions which were said to relate to the purchase orders, in arguing that such provisions or conditions actually "indicate" that the Appellant purchased the materials, etc., which it used in performing the contracts and in earning its fixed fees thereunder, for the account of the

government, and as the agent of the government. In this respect the Appellant refers to paragraphs 18 and 19 of the Conditions (R. p. 887) and also other provisions as are contained on pages 886 and 889 of the Record. The conditions referred to by the Appellant are so vague, uncertain and ambiguous in their terms and even in their implications, that not even an expert or an able lawyer can interpret their real meaning, much less laymen like the vendors or suppliers.

It is, however, very noticeable in this respect that throughout the Conditions the contractor (and not the government) is referred to as the "Buyer" or purchaser, and the vendor as the "Seller."

Specific reference is made in this respect to what the Appellant has to say on pages 12, 13, 14 and 15 of its Jurisdictional Statement, and under subtopic "d," entitled "The Purchase Order Terms and Conditions Indicate that Procurements were for the Account of NASA."

We would think in this regard that it would take much more than an "indication" for a contractor or anyone else for that matter to bind the government's funds or to pledge its credit.

Neither the contracts, or the instructions or conditions said to relate to the purchase orders, provide in any place or at any point that the cost-plus contractor was to be the agent of the government (NASA) in purchasing the materials or that the cost-plus contractor was authorized to bind the funds of the government as to the payment of the purchase price or to in any respect pledge the government's credit in this respect. Such expressions in both the contracts, and in the instructions or conditions said to relate to the purchase orders, are very conspicuous by their being completely absent therefrom.

For the protection of the public, and as a matter of public policy, it appears that if the cost-plus contractor had the

authority to act as the government's agent and to bind its funds and to pledge its credit, that this should be expressed in the contracts and in the conditions in clear and unmistakable language; not just be intimated or "indicated" in some hidden ball play or some remote and indefinite part of the conditions or instructions.

On the other hand, it does appear significant in this respect that cost-plus-a-fixed-fee Contracts 2577 and 5608, both under "Services and Supplies to be Furnished, Statement of the Work," very clearly and expressly provide that the contractor shall perform the work under the contracts and furnish the labor, materials, etc., "as an independent contractor and not as an agent of the government." See Appellant's Exhibits 1(a) and 1(b), R. pp. 320 and 444.

Appellant says that these very clear and expressed provisions of the contracts are mere scraps of paper and are actually nothing more than labels. However, it appears that they were inserted in these contracts for some purpose, and not to just fill up space.

e. The Title Provisions Of The Purchase Orders And The Contracts Do Not Determine Who Is The Purchaser; Nor Do They Authorize The Contractor To Bind The Government For The Purchase Price, Or To Pledge Its Credit.

After considering practically the same title and government property provisions contained in the contract and in the conditions relating to the purchase orders in that case, and under facts very similar to the facts in these cases, the Alabama Supreme Court in **Associated Contractors v. Hamm**, 277 Ala. 500, 172 So.(2d) 385, at 386-388, incl. (1965), concluded, as follows:

> "These various provisions do not make it crystal clear as to the exact intention of the parties with respect to.

technical legal title. However, we are in complete agreement with the trial court in its conclusion that at least insofar as the Alabama Use Tax statute is concerned, the Associated Contractors had sufficient title, control and possession of these various materials when they came to rest in this state to invoke the statute. The language of the statute does not seem to indicate that the legislature intended to predicate the tax upon one who held technical legal title and no other."

(Emphasis Supplied)

172 So.(2d) at page 387.

It also seems significant in this respect that this court in **Alabama v. King & Boozer**, 314 U.S. 1, at 13 and 14, 62 S.Ct. 43, at 47, in considering similar title and government property provisions, said:

"The circumstance that the title to the lumber passed to the government upon delivery does not obligate it to the contractor's vendor under a cost-plus contract more than under a lump sum contract."

314 U.S. at pages 13 and 14.

Speaking also in **Alabama v. King & Boozer**, supra, about the supervision and control and reservations or conditions in the contracts, etc., this court to practically the same effect asserted:

"But, however extensively the government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the government to enter into contracts or to pledge its credit."

(Emphasis Supplied)

314 U.S. at page 13.

f. The Contractor Paid The Vendors With Its Own Private Funds, And Pledged Its Own Credit -- Not That Of The Government (NASA).

While we hesitate to wear the term out, we know of no better way to express it than to say that under the undisputed evidence that the Appellant ordered the materials, was billed for them by the suppliers, paid the suppliers with its own checks and out of its private bank account and with its own funds. Moreover, that the suppliers looked to the Appellant (not to the government) for payment. (R. pp. 245, 246, 247, and 265; Stipulation, R. p. 310; and Purchase Orders, R. pp. 394-1029, incl., and Billings, R. pp. 1030-1036, incl.

Moreover, neither the contracts nor the conditions relating to the purchase orders gave the Appellant any authority, expressed or otherwise, to obligate the funds of the government or to bind the government as to the payment of the purchase price or to obligate its credit. To the contrary, Contracts 2577 and 5608 expressly provided that the Appellant, as the cost-plus contractor, was to perform the work and to furnish the management, labor, materials, equipment and supplies "as an independent contractor and not as an agent of the government." (R. pp. 320 and 444).

We cannot see where the time that the government reimbursed the "independent contractor" for the cost of the management, labor, materials, etc. is important. The Appellant in the first place furnished all of these items "as an independent contractor."

g. The Alabama Court Based Its Opinion On King & Boozer And United States v. Boyd.

The Alabama Supreme Court reversed and rendered the judgments of the Circuit Court of Montgomery County in these cases, and in doing so rewrote the judgments in accordance with its opinion of October 3, 1968 (Jurisdictional Statement, Appendix B, pages 10a-29a), and as modified and extended on

rehearing on November 7, 1968 (Jurisdictional Statement, pages 29a-32a; also see Appendix D, page 33a).

The reversing of the judgments of the Circuit Court was not based solely on the fact that Contracts 2577 and 5608 contained the provision that the contractor was to perform the contract and furnish the materials, etc., "as an independent contractor and not as an agent of the government." This was indeed a material factor, but certainly not the only one. The court, after reviewing the facts, and also the findings and conclusions of the Circuit Court; reversed the judgments of the lower court in their entirety.

In doing this the Alabama court based its decision on **Alabama v. King & Boozer**, supra (Appendix B, p. 27a), and also on **United States v. Boyd**, 378 U.S. 39, at pp. 48 and 50 (Appendix-B, pp. 28a and 29a).

> "We think the case controlled by **Alabama v. King & Boozer**, supra. There, as here, the contract provided that title to all materials and supplies for which the contractors were "entitled to be reimbursed" should vest in the government upon delivery at the site of the work or at an approved storage site and upon inspection and acceptance by the government officer. There the Supreme Court held that
>
> > '* * *we think all the provisions which we have mentioned, read together, plainly contemplate that the contractors were to purchase in their own names and on their own credit all the materials required, unless the government should elect to furnish them; that the government was not to be bound by their purchase contracts, but was obligated only to reimburse the contractors when the materials purchased should be delivered, inspected and accepted at the site.
>
> * * *

> But, however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the government to enter into contracts or to pledge its credit.' "
>
> (Emphasis Supplied)
>
> Jurisdictional Statement, Appendix B, page 27a.

The other factors on which the Alabama court proceeded were based on the facts, and mainly the fact that the Appellant (*not* the government) was the actual "purchaser" of the material, etc., and the one on whom the tax is said to fall.

The alleged question of sales for resale was fully treated with by the Alabama court on rehearing (Jurisdictional Statement, Appendix B, pages 30a and 31a). The question of whether the sales were sales for resale or wholesale sales, is solely a question to be resolved under the State Sales Tax statute defining what under the sales tax constitutes "wholesale sales" and "retail sales." (Appendix D, Section 1(i) and 1(j), pp. 37a and 38a).

V.

THE FEDERAL QUESTION IS NOT SUBSTANTIAL, AS IT HAS ALREADY BEEN RESOLVED BY THIS COURT.

The alleged question presented is whether the Alabama Sales Tax as levied under Section 2(a) of Act 100, supra (Appendix D to Jurisdictional Statement, page 40a), Title 51, Section 783(3) (a) Pocket Part, Alabama Code, Recompiled 1958, on the retail sale, and on the "purchaser," was constitutional as applied to the Appellant as a cost-plus-a-fixed-fee contractor for profit, and under the facts of these cases?

Stated in another way and in short, was the United States (NASA) the "purchaser" of the materials purchased from the vendors and used by the Appellant, as the cost-plus contractor, to perform the contracts, or was the Appellant as an "independent contractor" the "purchaser," on whom the sales tax is said to fall?

If the government purchased the materials from the vendors, or the Appellant purchased them as the actual and duly constituted agent of the government, with full authority to bind the government to pay for the materials or to pledge the government's credit to the vendors, then the sales would be exempt from the tax. However, in these cases both the facts and the contracts clearly show to the contrary that the Appellant, as the contractor, purchased the materials from the vendors with its own private funds, and that the Appellant in making such purchases had no authority whatsoever to bind the government for the payment of the purchase price or to pledge the government's credit in this respect.

In Reply to Appellant's Reason 1.

This court in **United States v. Boyd** (1964), 378 U.S. 39, at 49 and 50, 84 S.Ct. 1518, at 1524 and 1525, accepted the principles of **King & Boozer, Curry, Esso** and **Muskegon** as providing the proper balance between the interest of the state to tax and the interest of the government to be free from taxation. Alteration of the principles of **Boozer, Curry, Esso** and **Muskegon**, this court in the **Boyd** case (378 U.S. at pages 49 and 50, 84 S.Ct. at pages 1524 and 1525) found not to be its responsibility, but that of the Congress.

Tennessee, in the **Boyd** case, collected from **Union Carbide** and **H. K. Ferguson Company**, the government cost-plus contractors involved, sales and use tax upon purchases made

by them pursuant to their contract with the Atomic Energy Commission (hereinafter referred to as the AEC). The companies and the AEC, seeking to recover these taxes under the concept of governmental immunity, asserted that the United States was the actual purchaser, and that the use of the property purchased was not for the companies' commercial benefit, but was a use exclusively for the benefit of the United States.*4

Operating under a cost-plus-a-fixed-fee management contract, Carbide was obligated to manage the AEC installation at Oak Ridge, with the AEC retaining the right to supervise and issue major policy directives. A specific function of Carbide was the procurement of supplies and equipment, which it was free to do without AEC approval in amounts not exceeding 100,000 dollars. Ferguson's cost-plus-a-fixed-fee contract required construction services at the plant. Purchase of essential equipment was handled similar to the system used by Carbide, except Ferguson was restricted to 10,000 dollars without approval. In the trial court the chancellor entered a decree

*4 Carbide was a litigant in an earlier case with the Tennessee Department of Revenue, wherein it contended that it was not subject to Tennessee sales and use taxes. Its claim was based on two premises: (1) that it was an agent of the United States, and (2) that Section 9(b) of the Atomic Energy Act, 60 Stat. 765 (1946) afforded statutory exemption. The Supreme Court of Tennessee held in **Carbide and Carbon Chemical Corp. v. Carson**, 192 Tenn. 150, 239 S.W.(2d) 27 (1951), that Carbide was not an agent but an independent contractor, but that it was exempt under Section 9(b). The Supreme Court of the United States affirmed. **Carson v. Roane-Anderson Co.**, 342 U.S. 232 (1952). In 1953 Congress repealed the language of Section 9(b), 67 Stat. 575 (1953), expressly to remove the immunity previously created by statute as aforesaid, and for the purpose of making such contractors subject to State Sales and Use Tax, the same as other government cost-plus contractors, where the incidences of such taxes fall on such independent contractors, and not directly on the government.

holding the companies liable for the sales and use taxes. On appeal, the Tennessee Supreme Court reversed as to the sales tax, but sustained the collection of the contractors' use tax on the theory that the companies were independent contractors. Considering only the validity of the use tax, this court, affirming the Tennessee Court, held the tax was not levied directly upon the government, but levied upon the companies' private use, and was therefore not violative of the constitutional immunity of the United States. **United States v. Boyd** (1964), supra.

The courts all agreed that **Carbide** and **Ferguson**, like **Carbide**, in a former case, and also **Roane-Anderson (Carbide and Carbon Chemical Corp. v. Carson**, 192 *Tenn.* 150, 239 S.W.(2d) 27 (1951); **Carson v. Roane-Anderson Co.**, 342 S.Ct. 232, 72 S.Ct. 257 (1952), were not agents of the United States in purchasing the necessary materials, etc., to perform the government cost-plus contracts in those cases, and were exempt from state sales tax and state use tax only because of being expressly given a special exemption as AEC Contractors under Section 9(b) of the Atomic Energy Act, which the Congress repealed in 1953 in order to put AEC Contractors on the same basis as all other government cost-plus contractors.

As pointed out by this court in **Boyd**, this served to completely nullify both the decisions of the Supreme Court of Tennessee and this court in **Roane-Anderson v. Carson**, supra, concerning any exemption at all to AEC Contractors, as such contractors were held in those cases to be independent contractors and not agents of the United States in making the purchases of the materials, and subject to Tennessee's sales and use taxes, but for the special exemption of AEC Contractors under Section 9(b) of the AEC Act, now repealed.

In discussing this and the effects thereof this court in **United States v. Boyd**, supra, stated:

> "It is undoubtedly true, as the Government points out, that subjection of government property used by AEC Contractors to state use taxes will result in a substantial future tax liability. But this result was brought to the attention of Congress in the debates on the repeal of § 9(b), which exempted the activities of AEC Contractors from state taxation; indeed the AEC argued that the repeal would substantially increase the cost of the atomic energy program by subjecting AEC Contractors to state "sales and use taxes" and "business and occupation" taxes. Nontheless, Congress, well aware of the principle that "constitutional immunity does not extend to cost-plus-fixed-fee contractors of the Federal Government, but is limited to taxes imposed directly upon the United States." S.Rep. No. 694, 83d Cong. 1st Sess. 2, U.S. Code Congressional and Administrative News 1953, pp. 2379, 2380, repealed the statutory exemption for the declared purpose of placing AEC Contractors in the same position as all other government contractors. Act of August 13, 1953, c. 432, 67 Stat. 575."
>
> (Emphasis Supplied)
>
> **Boyd**, supra (1964), 378 U.S. at pages 47, 48, and 49, 84 S.Ct. at page 1524.

It is a pity that the Circuit Court could not have read the foregoing before going into its some two and one-half page discourse at the beginning of the judgments which it entered in these cases (Appendix A of the Jurisdictional Statement, pp. 1a, 2a, etc.) and wherein it gave the State of Alabama a rather severe reprimand for even attempting to levy sales taxes against the cost-plus-a-fixed-fee contractor involved in these cases.

> "The constitution immunizes the United States and its property from taxation by the States, **M'Culloch v. Maryland**, 4 Wheat. 316, 4 L.Ed. 579, but it does not

forbid a tax whose legal incidence is upon the contractor doing business with the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States." (Citing **Alabama v. King & Boozer**, supra, **James v. Dravo Contracting Co.**, supra, among other cases).

(Emphasis Supplied)

Boyd, supra, 84 S.Ct. at page 1521.

"The use by the contractor for his own private ends -- in connection with commercial activities carried on for profit -- is a separate and distinct taxable activity."

Boyd, supra, 378 U.S. at page 45, 84 S.Ct. at 1522.

"The principles laid down in **Boozer, Curry, Esso**, and **Muskegon**, we think strike a proper judicial accommodation between the interest of the State's power to tax and the concerns of the Nation, they are workable and we adhere to them. *If they unduly intrude upon the* business of the Nation, it is for Congress, in the valid exercise of its proper powers, not this court, to make the desirable adjustment."

(Emphasis Supplied)

Boyd, supra (1964), 378 U.S. at page 44, 84 S.Ct. at page 1525.

As pointed out by this court in **Boyd** (378 U.S. at 43 and 44, Footnote 5, 84 S.Ct. at page 1521) the Tennessee Supreme Court in the **Boyd** case, refused to permit the state to collect the sales tax from the contractors, relying on **Kern-Limerick, Inc. v. Spurlock**, supra, because of the fact that the contracts and the purchase orders in the **Boyd** case expressly provided "that the company will make payment hereunder from government funds and not from its own assets * * * and that nothing herein shall preclude liability of the government for any payment properly due hereunder if for any reason such payment is not made by the company from such government funds."

(Emphasis Supplied)

378 U.S., pages 43 and 44, Footnotes 4 and 5, 84 S.Ct., pages 1520 and 1521.

In other words under the contracts and purchase orders the vendors were to be paid with government funds, and not those of the contractor, and under the purchase orders the government made itself liable directly to the vendors for the purchases of materials, etc.

This is just the antithesis of the situations in **King & Boozer** and in this case, and where the principles of the Boyd case are applicable.

And while the Tennessee Court held such purchases to be direct sales to the United States and the government to be the purchaser, it held that the contractor was an independent contractor, and that the use of the materials by the contractor, as such, were taxable under the Tennessee Use Tax Law. The United States Supreme Court affirmed (84 S.Ct., at page 1525) as to the holding that the Tennessee Use Tax was due by the contractor as an independent contractor, but in doing so it noted that no question was raised concerning the validity of the holding of the Tennessee Court in regard to the sales tax. Thus, seemingly implying that it might not have agreed with the Tennessee Court's holding as to the sales tax, had that question been raised. (See in this respect 378 U.S., at pages 43 and 44, Footnote 5, 84 S.Ct., at page 1521).

This is also believed to be the case as **King & Boozer** and **Curry** were mainly the cases relied upon by this court in the **Boyd** case (1964), and because the court both reiterated and reaffirmed the doctrine of those cases. (378 U.S., at pages 44, 45, 49, 50, and 51, 84 S.Ct., at pages 1521, 1522, and 1525).

At any rate neither of the contracts in these cases, nor the purchase orders, have any such provisions as those in the

Boyd case. The Contracts 2577 and 5608 expressly state that the materials, etc., are to be furnished by the Appellee "as an independent contractor and not as an agent of the government." Moreover, the purchases were all made in the name of the Appellee, as the contractor, and the vendors billed the Appellee for the materials, etc., and the Appellee paid for them with its own funds. There was not even the slightest intimation to the vendors or suppliers that the government was the purchaser. The undisputed evidence is that the suppliers looked exclusively to the Appellant, the contractor, for payment and not to the government. Thus, the Appellant, and not the government, was clearly the "purchaser" on whom the tax is said to fall. (See R. pp. 246, 245, 310, and 265. Purchase Orders, R. pp. 904-1029, incl., Billings or Invoices, R. pp. 1030-1039, incl.)

The economic and social adjustments of the 1930's, requiring increased governmental activities, caused the states to enact general sales taxes to meet the demands for increased expenditures. With the purchasing power of the nation supported by federal work programs, the states viewed these projects as a justified source of taxation considering the fact that the contractors were private business concerns realizing substantial profits and fees from such programs, the same as if they were working for private concerns. James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, presented the issue of whether state taxation of contractors involved in these projects was an intrusion upon federal immunity. A West Virginia Sales Tax upon a contractor engaged in constructing a dam for the United States was upheld as a tax not upon the government or its property, but upon an independent contractor. The advent of the Second World War and the attendant dependence of the government upon private contractors again raised the immunity question. Two cases asserting immunity from Alabama tax,

Alabama v. King & Boozer, 314 U.S. 1, 62 S.Ct. 43, involving the sales tax, and **Curry v. United States**, 314 U.S. 14, 62 S.Ct. 48, involving the use tax, were concluded in favor of the right of the state to tax. The court declared that the government was not the purchaser and reasoned that "the Constitution without implementation by congressional legisl[illegible] does not forbid a tax upon government contractors becau[illegible]rden is passed on economically by the terms of the contr[illegible], or otherwise, as a part of the construction cost to the government. In place of the economic burden test, this court espoused the legal incidence test: if the legal incidence of the state tax is directly upon the United States, it is violative of the Federal Government's immunity; if the government is only indirectly affected through increased cost of materials or services, the tax is valid. The states' victory, as represented by this criterion emphasizing form rather than substance, was lessened by **Kern-Limerick, Inc. v. Spurlock**, 347 U.S. 110, 74 S.Ct. 403 (1954), a case factually similar to **King & Boozer**.

The important distinction was that the **Kern-Limerick, Inc.** contract labeled the contractor as a purchasing agent for the United States, with the United States directly liable to the vendor for the cost and with the title vesting immediately in the United States. Holding the purchase to have been made by an authorized agent of the United States, this court viewed the transaction as constitutionally immune from sales taxation. The case is significant because of its recognition of the concept of "contract agency." Logically, the decision represented not an overruling of **King & Boozer**, but a corollary to it.

This court in **United States v. Boyd**, 378 U.S. 39, 84 S.Ct. 1518, accepted the principles of **Boozer, Curry, Esso** (345 U.S. 495, 73 S.Ct. 80) and **Muskegon** (355 U.S. 484, 78 S.Ct.

483), as providing the proper balance between the interest of the state to tax and the interest of the United States to be free from taxation. Alteration of these principles the court found not to be its responsibility, but that of congress. As to the applicability of these principles to the instant case, the court established as the vital consideration the fact that **Carbide** and **Ferguson** were using the property for their own commercial benefit[*5] as part of their regular business activities. It is this use for private ends that the court marked as a separate and taxable activity.

The decision of this court in **Boyd** is significant in two regards. First, as an immediate practical consideration AEC Contractors, previously granted statutory immunity from state taxation, are placed in the same position as all other government contractors. Of greater significance, however, is the resulting contraction of the immunity area, and a further isolation of **Kern-Limerick**. The opinion, though terse, reveals a categorical affirmance of the **King & Boozer** "legal incidence" test, with the measure of "benefit" to the contractor serving as an additional determing factor.

From the standpoint of constitutional theory, the primary objection to the granting of tax immunity to contractors with the government is that private commercial concerns are thereby cloaked with federal sovereignty in derogation of state sovereignty; also that it is discriminatory as against other private contractors. Whatever the view may be as to the merits and demerits of immunity, for the present the limits remain

[*5] The appellant, Boeing, used all of the materials, etc., which it purchased in these cases in performing contracts No. 2577 and 5608, and earning its fixed fees of same, to wit, $492,038.00, and $25,215,111.00, respectively. See Contracts 2577 and 5608, and supplements thereto, Exhibits 1(a) and 1(b), R. pp. 318 and 442, respectively.

prescribed by the "legal incidence" test. In the absence of a formal declaration of agency*6 as existed in **Kern-Limerick**, the states can tax those contractors who purchase or use the property for their own private commercial benefit. The case of **United States v. Boyd**, supra, as decided by this court, has clearly laid down these principles, and until it is overturned, if ever, by this court it represents the latest decision and guiding light in the government contractor field.

REASON II: The Decision Below Is In Full Keeping With The State Court Decisions, Where Facts Are Similar.

Some of the cases, where facts are similar and which are in full keeping with the decision of the Alabama Supreme Court in these cases are:

Goodyear Aircraft Corp. v. Arizona State Tax Commission, 402 P.(2d) 423, at 429-431 (1965).

Thiokol Chemical Corp. v. Peterson, 15 Utah (2d) 355, 303 P.(2d) 391, at 393-395 (1964).

Associated Contractors v. Hamm, as Commissioner of Revenue, 277 Ala. 500, 172 So.(2d) 385 (1965).

Carbide and Carbon Chemical Corp. v. Carson, 192 Tenn. 150, 239 S.W. (2d) 27 (1951).

The rationale of all of the foregoing cases, is best summed up by the Arizona Supreme Court in the **Goodyear Aircraft Corporation** case, as follows:

"We therefore hold that since the purchase orders (contracts) in question were entered into in the name of the contractor, on the contractor's credit and with

*6 Here in prime and in cost-plus contracts, Nos. 2577 and 5608, the formal declaration is that the Appellant, contractor, is to perform the contract, and furnish the labor, materials, etc., "as an independent contractor and not as an agent of the government." Exhibits 1(a) and 1(b), R. pp. 320 and 444, respectively.

nothing more denoting that the contractor acted for the United States than in most instances a Government contract number, some limited Government control, and in some instances title vesting immediately in the Government, that the sales were not direct sales to the Government. As such the trial court's finding is reversed on this issue."

(Emphasis Supplied)

Goodyear Aircraft Corp. v. Arizona State Tax Com'n., 402 P.(2d) 423, at 431.

The Arizona court in the same case (402 P.(2d) 423, at pages 429-430), clearly distinguishes the **Tawes, Avaco, General Motors Company** and other state court cases referred to by the Appellant on page 24 of its Jurisdictional Statement, and points out that practically all of those cases had provisions in either the contracts or the purchase orders similar to the contracts and purchase orders in **Kern-Limerick, Inc. v. Spurlock**, 347 U.S. 110. That is certainly not the case here.

United States v. Livingston, 179 F. Supp. 9, Aff'd per curiam 346 U.S. 281, involves facts entirely different from those involved in these cases. Du Pont, the contractor in **Livingston**, was not paid a fee or any profit, it was a "dollar-a-year-man." All purchases were made with government funds, and the vendors were paid with such funds. Moreover, the government's credit was pledged to the vendors and not that of the contractor. The contract expressly provided that Du Pont was to perform same as the agent of the government. The situation, as well as the contract, has been said to be a most unusual one, and the case not to set a precedent.

CONCLUSION

The conclusive evidence in these cases shows that the Appellant, as the cost-plus contractor, purchased the materials, etc., which it used in performing cost-plus-fixed-fee contracts Nos. 2577 and 5608, in its own name and with its own funds, or by pledging or risking its own credit. These cases then clearly fall within the scope of **Alabama v. King & Boozer**, 314 U.S. 1, and **Curry v. United States**, 314 U.S. 14, and the principles thereof which have been recently restated and reaffirmed in **United States v. Boyd**, 378 U.S. 39. The decision of the Alabama Supreme Court merely follows said cases. The question has already been resolved against the Appellant. There is no need for further review. The appeal should be dismissed, and the decision of the Alabama Supreme Court affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, William H. Burton, of Counsel for the Appellee hereb certify that I have served copies of the above and foregoi Motion to Dismiss or Affirm and Brief in Support Thereof the Honorables John Bingham and William J. Ward, Marti Balche, Bingham, Hawthorne and Williams, 600 North 18 Street, Birmingham, Alabama, 35203, as Counsel of record f the Appellant, by mailing copies thereof in a duly addresse envelope, with first class postage prepaid, on this the _____ day of February, 1969.

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